

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MIDWAY MFG. CO.,)
 a Corporation,)
) Plaintiff,)
) v.)
THE MAGNAVOX COMPANY,)
 a Corporation,)
) and)
SANDERS ASSOCIATES, INC.,)
 a Corporation,)
) Defendants.)

CIVIL ACTION NO.
74 C 1657 CBM

THIRD SUPPLEMENTAL AFFIDAVIT OF THEODORE
W. ANDERSON, COUNSEL FOR DEFENDANTS

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, THEODORE W. ANDERSON, being first duly sworn,
depose and say:

1. I am the same Theodore W. Anderson who has executed earlier affidavits in this action.
2. I am one of the attorneys for the defendants in the above-entitled action and for the plaintiffs in the consolidated civil actions The Magnavox Company and Sanders Associates, Inc. v. Bally Manufacturing Corporation, Chicago
Dynamic Industries, Inc., Empire Distributing, Inc. and Midway Manufacturing Co., Civil Action 74 C 1030 and The Magnavox Company and Sanders Associates, Inc. v. Seeburg Industries, Inc., The Seeburg Corporation of Delaware, Williams Electronics, Inc.

ATTACHMENT C

and World Wide Distributors, Inc., Civil Action 74 C 2510, now pending in the United States District Court for the Northern District of Illinois, Eastern Division and assigned to the Honorable Prentice H. Marshall.

3. The first pretrial conference was held before Judge Marshall on October 1, 1974 in the Illinois litigation and the case is now on Judge Marshall's call for November 29, 1974 for a report on the progress of discovery and status as shown on the Court's Minute Order of October 1, 1974 attached hereto as Exhibit I.

4. On October 25, 1974 Judge Mashall entered an order granting plaintiff's motion to consolidate the higher numbered case, 74 C 2510, into the lower numbered case, 74 C 1030, for all further purposes (a copy of the motion being attached hereto as Exhibit J), and thus all issues against all accused infringers in the Illinois cases (including plaintiff here, Midway Mfg. Co.) can be resolved in one consolidated action including all issues regarding the claims by or against Midway Mfg. Company, one of the named defendants in the first Illinois action and the plaintiff here. Magnavox and Sanders will not oppose a motion in the Illinois case by defendant Midway Mfg. Co. to add a counterclaim under the declaratory judgment act 28 U.S.C. 2201 and 2202 to seek declaratory relief as to U. S. Patents 3,728,480 and 3,778,058, irrespective of the parties positions on the merits of such a counterclaim.

5. The parties and accused products now before the Honorable Prentice H. Marshall in the Illinois case are comprehensive, including:

A. Manufacturers of accused video games and their respective accused products:

1. Midway Mfg. Company whose accused products are all made in the Northern District of Illinois.
2. Chicago Dynamic Industries whose accused products are all made in the Northern District of Illinois.
3. Seeburg Corporation of Delaware whose accused products are all made in the Northern District of Illinois.
4. Williams Electronics, Inc., whose accused products were all made in the Northern District of Illinois but who, on information and belief, has now merged into Seeburg.

B. The accused video games of Allied Leisure Industries:

These accused games were designed and engineered by Universal Research Laboratories in the Northern District of Illinois and are and have been sold, leased and used extensively in the Northern District of Illinois by defendant Empire Distributing, Inc.

C. The accused video games of Atari, Inc.:

These accused games were initially investigated by defendant Bally Mfg. Co. in the Northern District of Illinois, then incorporated into the product line of defendant Midway Mfg. Co. and manufactured in the Northern District of Illinois and also sold, leased and used by the defendant Empire Distributing Co. in the Northern District of Illinois.

D. The video games of other manufacturers which

will be accused including Kee Games, Inc., Ramtek and perhaps others are sold, leased and used by the Illinois defendants and in particular Empire Distributing, Inc. and World Wide Distributors, Inc. within the Northern District of Illinois.

The foregoing accused video games on information and belief comprise the vast majority of the market throughout the United States.

6. On information and belief Midway Mfg. Co. has no substantial connection or business in the Southern District of New York. The Illinois action against Midway Mfg. Co. could not have been brought in the Southern District of New York for lack of venue and could not be transferred to the Southern District of New York under 28 U.S.C. 1404(a).

7. Discovery has proceeded and is proceeding on the merits of the case in the Illinois litigation. The plaintiffs, The Magnavox Company and Sanders Associates, Inc. have filed answers to an extensive set of interrogatories, copies of which are on file in this civil action as Exhibit 7 to the Third Affidavit of Donald L. Welsh. The defendant Chicago Dynamic Industries, Inc. has filed an extensive set of answers to plaintiff's interrogatories in the Illinois litigation. There are pending Requests for production of documents and things returnable by Bally Mfg. Co., Midway Mfg. Co., Empire Distributing Co. and Chicago Dynamics on November 20, 1974.

8. On information and belief there will be no discovery in this New York civil action by either plaintiff or defendant which will take place in the Southern District of New York and there are no relevant documents known to me which are located in the Southern District of

New York. The sole allegation by plaintiff of any relevant connection of any party with the Southern District of New York is gleaned by plaintiff from the answers of Magnavox and Sanders to interrogatories 44 and 49 of Chicago Dynamics in the Illinois action indicating a confidential demonstration of the invention in 1968 to three Teleprompter personnel, which is a totally irrelevant and immaterial event and plaintiff's reliance thereon emphasizes the propriety of transfer to Illinois.

9. A civil action was filed by Allied Leisure Industries, Inc. against Midway Mfg. Co. in the United States District Court for the Northern District of Illinois, Eastern Division, in about October, 1973, Civil Action 73 C 2682 in which Allied Leisure Industries, Inc. charged Midway Mfg. Co. with infringement of copyrights and with unfair competition based upon the alleged copying by Midway Mfg. Co. of circuits for video games designed for Allied Leisure by Universal Research Laboratories, Inc. of Elk Grove, Illinois and the manufacture by Midway Mfg. Co. of video games which use the Universal designs. These same games allegedly designed by Universal in the Northern District of Illinois for Allied and sold by Empire in the Northern District of Illinois are alleged to be infringements of the video game patents of Magnavox and Sanders in the consolidated Illinois patent infringement action against Midway et al., Civil Action 74 C 1030 and 74 C 2510.

10. The controversy between Midway Mfg. Co. and Magnavox and Sanders is completely centered and concentrated in the Northern District of Illinois. The discussion and submission of the proposed non-exclusive license attached to the third Welsh affidavit as Exhibit 8 occurred in the

Northern District of Illinois with Midway and Bally representatives in the Northern District of Illinois and no discussion, negotiation or submission involved the Southern District of New York.

11. The activity of Sanders Associates, Inc. with respect to the development of the inventions of video games and obtaining patents thereon and the initial activities in seeking licensees thereunder is relatively limited in comparison to the extensive physical facilities, documentations and personnel involved in the design, engineering, arrangements for manufacturing, promotion and marketing of the Magnavox Odyssey video game and the accused video games, all of which occurred in the Northern District of Illinois or the adjacent area of Northern Indiana.

12. All counsel for the parties here who will be involved in the merits of this action, namely, Donald L. Welsh, Esq., A. Sidney Katz, Esq. and the firm of Fitch, Evan, Tabin and Luedeka who represent Bally, Midway and Empire in the Illinois litigation and Midway in this action and Theodore W. Anderson, Esq., James T. Williams, Esq. and the firm of Neuman, Williams, Anderson and Olson who represent Magnavox and Sanders in all actions, practice in Chicago, are residents of the Northern District of Illinois and have their respective offices located within a radius of less than two city blocks of one another and within a radius of two city blocks of the court rooms of the United States District Court for the Northern District of Illinois.

13. No other lawyer, to the best of my knowledge and belief, will be actively engaged in any way in the discovery, pretrial proceedings or trial of the case

involving Midway, Magnavox and Sanders. The inclusion of the names of house patent counsel Thomas A. Briody, Esq. of The Magnavox Company and house patent counsel Louis Etlinger, Esq. of Sanders Associates on certain papers filed in this case is for purposes of information only and neither anticipate an active roll in the litigation. Mr. Etlinger has attended no proceeding to date in either the Chicago or New York action and has no present intention of doing so.

14. In view of the facts set forth in paragraphs 10-13 hereof and solely in the interest of conserving the time and resources of counsel for all parties, Magnavox and Sanders agree that all documents or things which will be produced by Sanders in the course of the pretrial or trial proceedings in the Illinois case will be produced in Chicago at the offices of Neuman, Williams, Anderson and Olson, and all witnesses over which Sanders has control who testify in the Illinois case will be produced in Chicago for purposes of taking their testimony thus eliminating any travel to Nashua, New Hampshire for counsel for any party to this action or the Illinois action.

15. In addition to the witnesses referred to in paragraph 14 above, there are many other individuals who will or may be called as witnesses, and in many cases served with a subpoena as a witness at the actual trial. Many of these would be subject to subpoena or would be required to testify in the Illinois case but could not be compelled to testify at the trial of this New York case. Among the witnesses whose testimony may be taken in the Illinois action are:

A. Midway Mfg. Co.

1. Malachi L. Hannigan, Comptroller, who swore in the Northern Illinois case of Allied Leisure v. Midway that Midway was manufacturing 75 accused Winner IV video games in Chicago every day, as set forth in attached Exhibit K.
2. Henry Ross, Secretary-Treasurer
3. Maurice M. Wolverton, President
4. Mr. Blahuta, Chief Electronic Engineer involved in video games.
5. Roy E. Petherbridge, Esq., who acted as agent for Midway as undisclosed principal.
6. Other Midway personnel involved in the design, production and marketing of the various video games which are accused in the Illinois action.

Although on July 16, 1974 Magnavox and Sanders served Midway with a comprehensive set of interrogatories in the Illinois case to identify the accused products and the names of witnesses, Midway has not, as of today, October 26, 1974, answered those interrogatories. Midway obtained multiple extensions of time, but is now under an order to answer the interrogatories by October 28, 1974.

To the best of my knowledge and belief all Midway witnesses will be within the jurisdiction of the Court for the Northern District of Illinois, at least Mr. Petherbridge and others not yet identified would not be subject to compulsory appearance in the New York action.

B. Bally Mfg. Corp. - parent corporation of Midway Mfg. Co.:

1. John A. Britz, Executive Vice President who initially considered the accused video games on behalf of Bally and/or Midway.
2. Joseph Lally, Chief Engineer who worked on original models of what became the accused video games.
3. William T. O'Donnell, President
4. Ross Scheer, Director of Marketing
5. Edward Berg, V.P. Manufacturing
6. Samuel W. Klein, Treasurer
7. William J. Tomlinson, Esq., Vice President and General Counsel, representative of Bally and Midway in negotiations and discussions with Magnavox personnel regarding the accused video games and a possible license.
8. Others who cannot be identified without the answers to our July 16, 1974 interrogatories.

I believe that all witnesses who will be called from Midway's parent company Bally are within the jurisdiction of the Illinois court and none is in the Southern District of New York.

C. Empire Distributing, Inc., sister corporation of Midway and distributor of its accused video games:

1. Joseph Robbins, Vice President and Chief Administrative Officer, Director of Bally.
2. Gilbert Kitt, President
3. Arnold Goldberg, Vice President
4. John Burns, Vice President
5. Mr. Segerson, General Manager
6. Mr. Rochetti, Sales Supervisor.
7. Jules Milman, Chief Executive of

Carrousel Time Inc., a wholly owned subsidiary
of Empire which leases Midway accused video games.

Other specific individuals will probably become known when
our interrogatories of July 16, 1974 are answered. It is
my belief that none of the witnesses listed are subject to
the jurisdiction of the New York court and all are subject
to the jurisdiction of the Northern District of Illinois.

D. Universal Research Laboratories of Elk Grove,
Illinois (which as pleaded in Allied Leisure v. Midway, Northern
District of Illinois action 73 C 2682 designed and
engineered at least some of the accused video games
made and sold by Midway Mfg. Co.

1. William Olliges, President
2. Ed Polanek, believed responsible for design
3. George H. Gerstman, of Lettvin, Pigott &
Gerstman, who represented Allied Leisure in
the design and copyright infringement case
against Midway on the accused video games
and represented Allied Leisure Industries in
negotiations with Magnavox and in the Illinois
action against Midway Mfg. Co. et al.

I believe that each of these witnesses is within the jurisdiction
of the Illinois court and not subject to the jurisdiction
of this court.

E. Chicago Dynamic Industries (which has filed
an affidavit of Edward C. Threedy in this New York action
indicating that it would be willing to abide by the decision of
this court on patent validity but not in any way submitting
itself to the jurisdiction of this court):

1. Edward C. Threedy, attorney for Chicago
Dynamic in the Illinois case and affiant
in plaintiff's Exhibit 6 in this action.

2. Samuel H. Gensburg, President and Treasurer
3. Jerry C. Koci
4. Avron Gensburg
5. Other persons not yet identified who are involved in the design, manufacture and sale of the accused video games.

All of these witnesses are believed to reside within the jurisdiction of the Northern District of Illinois, none is subject to the jurisdiction of the Southern District of New York.

F. Seeburg Industries, The Seeburg Corp. of Delaware and Williams Electronics:

I believe all engineering, manufacturing and related activities of these companies with respect to the accused video games has occurred in the Northern District of Illinois. On information and belief the Seeburg Corporation of Delaware is the principal operating company of Seeburg Industries and Seeburg operates in multiple plants in the Chicago area which in the aggregate exceed 850,000 square feet of floor space and said engineering, manufacture and distribution of the accused video games occurs in those facilities. I believe that all potential Seeburg witnesses are subject to the jurisdiction of the Northern District of Illinois and none is subject to the jurisdiction of the Southern District of New York.

G. World Wide Distributors:

This Illinois defendant buys, uses and sells or leases the accused video games including those of other Illinois defendants as well as those of Kee Games, Inc. On information and belief the business activities of World Wide Distributors relating to the accused video games is centered in its facilities in Chicago, Illinois and the

witnesses, whose names have not yet been determined are located within the jurisdiction of the Northern District of Illinois and not subject to the jurisdiction of the Southern District of New York.

16. At a hearing before the Honorable William J. Bauer in the United States District Court for the Northern District of Illinois, Eastern Division on Friday, October 19, 1973, in Allied Leisure v. Midway, 73 C 2682, Mr. Donald L. Welsh, attorney for the plaintiffs in this action and an attorney practicing and residing in the Chicago area, stated that the plaintiff here, Midway Mfg. Co., is in production of the video games charged as patent infringements by the defendants here at a rate of \$60,000 worth of video games per day. On information and belief all of this activity and the manufacture and shipment of the accused games takes place in the Chicago area. Mr. Welsh stated at the hearing on October 19, 1973 that there are 300 employees of Midway Mfg. Co. involved in the production of the accused video games. Such production and personnel involvement will require a large and extensive period of discovery and testimony and production of documents, the scope of which cannot be determined at the present time, and all of which is in the Northern District of Illinois.

17. All of the witnesses presently known to Magnavox who may be called to testify with respect to Magnavox and its Odysscy video games are either within the jurisdiction of the Northern District of Illinois or are nearby in Northern Indiana and include:

1. Richard T. Seeger, Esq., Gust and Irish,
Fort Wayne, Indiana
2. John DiAuito, Engineering Manager,
Odyssey, Fort Wayne, Indiana
3. John F. Slusarski, Engineering Manager,
Odyssey, Fort Wayne, Indiana
4. Jack W. Schrey, Senior V.P., Magnavox,
Fort Wayne, Indiana
5. Gerald G. Martin, President, Utah
Electronics, Huntington, Indiana
6. Robert E. Fritzsche, Product Engineer,
Odyssey
7. Ron Bradford, Bradford, Flash & Cout,
Skokie, Illinois
8. Fred Hindel
9. Robert Hass
both of Gray-North Advertising, Chicago,
Illinois
10. Samuel J. Rozel, Vice President and General
Counsel, Magnavox, Fort Wayne, Indiana
11. Thomas A. Briody, Patent Counsel, Magnavox,
Fort Wayne, Indiana

18. COURT WORK LOAD AND TIME INTERVALS

Attached hereto as Exhibit L are the Title Page and pages A-18 to A-21, A-26, A-27, A-30, A-31, A-38 and A-39 of the 1973 Annual Report of the Director, Administrative Office of the United States Courts, and as Exhibit M the Title Page and pages A-14 through A-17, A-22, A-23, A-26, A-27 of the 1974 Semi Annual Report of the Director, Administrative Office of the United States Courts. The exhibits show that the number of cases filed and work load of

the Southern District of New York are extremely heavy and as a consequence the time required to dispose of an average case is much longer in the Southern District of New York than in the Northern District of Illinois.

I have marked certain relevant entries in Exhibits L and M in red. They show that as of December 31, 1973, the total private civil cases pending in the Southern District of New York was 8,587 and in the Northern District of Illinois was 2,225.

19. The median time interval that a case disposed of during the first half of 1974 was pending in the Southern District of New York is 18 months and in the cases that actually go to trial the period is 30 months. In the Northern District of Illinois the corresponding delays are six months and 17 months respectively. Thus the time for disposing of this case will probably be more than one year longer than for the case in Illinois.

20. The median time interval from Issue to Trial in 1973 of non-jury civil cases tried in the Southern District of New York was 30 months while the median time interval from Issue to Trial of non-jury civil cases for the same period in the Northern District of Illinois was only 13 months. Thus, it will take almost a year and a half longer to reach this case for trial than for the Illinois case to reach the point of trial.

21. The market for video games is a rapidly developing and rapidly changing market and the infringement of the video game patents by Midway is believed to be continuing. Any delay in the trial of the infringement action against

Midway will prejudice Magnavox and Sanders. Furthermore, any delay as to Midway while the Illinois case proceeds against the other defendants and the other accused products will result in further prejudice and unreasonable expense to all parties concerned.

Further deponent saith not.

Theodore W. Anderson

Theodore W. Anderson

SUBSCRIBED AND SWORN TO
before me this 26th
day of October, 1974.

Judith M. Speckle
Notary Public